



CADR NEWSLETTER

THE OFFICIAL NEWSLETTER OF
CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION,
RGNUL, PUNJAB

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ABOUT US

The Centre for Alternative Dispute Resolution, RGNUL (CADR-RGNUL) is a research centre dedicated to research and capacity-building in ADR. The ultimate objective, at CADR, is to strengthen ADR mechanisms in the country by emerging as a platform that enables students and professionals to further their interests in the field.

In its attempt to further the objective of providing quality research and information to the ADR fraternity, the CADR team is elated to present the eighth Issue of the Third Volume of 'The CADR Newsletter'. The Newsletter initiative began with the observation that there exists a lacuna in the provision of information relating to ADR to the practicing community. With an aim to lessen this gap, the Newsletter has been comprehensively covering developments in the field of ADR, both national and international. The CADR Newsletter is a one-stop destination for all that one needs to know about the ADR world; a 'monthly dose' of ADR News!



ADR UPDATES

ARBITRATION

DOMESTIC ARBITRATION

1. REFERENCE TO ARBITRATION CAN BE DECLINED IF THE DISPUTE IS NOT RELATED TO ARBITRATION AGREEMENT: SC

The Supreme Court ruled that in case the dispute in question does not correlate to the arbitration agreement, the prayer for reference to Arbitration under Section 11 of the Arbitration and Conciliation Act can be declined. The Court also observed that it is not expected of the Courts to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator.

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2. SC RULES THAT CONTRAVENTION OF A STATUTE UNRELATED TO PUBLIC POLICY OR PUBLIC INTEREST, NOT A GROUND TO SET ASIDE AN AWARD

The Supreme Court held the contravention of a statute that is unrelated to public policy or

public interest is not a ground to set aside an arbitration award. It also made an observation that every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality', while referring to the disturbing tendency of Courts in setting aside Arbitral Awards.

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3. CHAIRMAN 'INELIGIBLE' TO ACT AS AN ARBITRATOR TO RESOLVE THE DISPUTE BETWEEN THE PARTIES UNDER SECTION 12(5) READ WITH SEVENTH SCHEDULE: SC

Supreme Court has held that though the word 'Chairman' is specifically not mentioned, he would be disqualified under Sub-section (5) of Section 12 read with Seventh Schedule as it is to be read as a whole and considering the object and purpose for which Section 12(5) read with Seventh Schedule to the Act came to be inserted. It also observed that the ineligibility of an arbitrator can be removed only by an 'express agreement

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4. SC UPHOLDS RS 4,600 CRORE ARBITRAL AWARD IN FAVOUR OF RELIANCE INFRASTRUCTURE LTD

The Supreme Court has upheld the 2017 arbitration award in favour of debt-laden Reliance Group, ADAG, led by Anil Ambani. The dispute emerged over fee and operations in 2012, when Ambani's firm stopped operating the capital's airport metro project and initiated an arbitration case against Delhi Metro alleging violation of contract and sought a termination fee.

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5. J&K HC CLARIFIES THE DIFFERENCE BETWEEN INTERIM ORDER AND INTERIM AWARD

The J&K HC has clarified that an interim award cannot be equated to an interim order that can be passed by an Arbitral Tribunal under Section 17 (1) (ii) (e) of the Act of 1996. The bench elucidated that an arbitral tribunal while passing an order u/s 17 (1) (ii) (e) would appropriately appraise the case at hand, the balance of convenience and other similar things but while making an interim award u/s 31 (6) of the Act, it has to be satisfied that there is a clear admission or acknowledgement of liability on the part of the party against which the award is propounded.

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INTERNATIONAL COMMERCIAL ARBITRATION

1. UNCITRAL EXPEDITED ARBITRATION RULES 2021 NOW IN EFFECT

The Expedited Arbitration Rules adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21st July have come into force from 19th September 2021. The Rules, comprising sixteen articles presented as an appendix to the UNCITRAL Arbitration Rules, were prepared by UNCITRAL's Working Group II. The Rules intend to provide a means for more expedited and economical arbitration and apply only when the parties agree to their application.

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2. DECREE NO. 34 OF 2021 REGARDING DIAC ISSUED

The Ruler of Dubai, Sheikh Mohammed bin Rashid Al Maktoum, issued Decree No. 34 of 2021 on 14th September, whereby two Arbitration Centres located within the Dubai International Financial Centre- DIFC-LCIA Arbitration Centre and Emirates Maritime Arbitration Centre- have been abolished and the status of the Dubai International Arbitration Centre has been bolstered. DIAC will replace DIFC-LCIA and EMAC when the

provisions of the Decree and the accompanying Statute are implemented by 19 March 2022.

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3. INTRA-EU ARBITRATION UNDER ECT NOT IN CONSONANCE WITH EUROPEAN UNION LAW

As per the Court of Justice of the European Union's (CJEU) decision in the case of *Republic of Moldova v. Komstroy* delivered on 2nd September 2021, Intra-EU Arbitration under the Energy Charter Treaty (ECT) is not compatible with European Union law. The CJEU ruled that the Investor-State Dispute Settlement mechanism as under Article 26 of the ECT is not applicable to intra-EU disputes.

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4. WAIVER OF RIGHT TO ARBITRATE: *FORBY* *V. ONE TECHNOLOGIES, LP:*

In the case of *Forby v. One Technologies, L.P.*, the United States Court of Appeals for the Fifth Circuit held that a party's right to arbitrate newly asserted federal law claims are not waived by that party's prior waiver of the right to arbitrate state law claims. By its order of 14th September 2021, the Fifth Circuit allowed *One Tech* to compel arbitration for fresh claims under federal consumer protection law, despite

earlier waiving the right to arbitrate older claims in the same matter under state law.

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5. PROHIBITION OF MANDATORY EMPLOYMENT-RELATED ARBITRATION UPHELD

The US Court of Appeals for the Ninth Circuit has allowed California to place a ban on mandatory arbitration. In its 2-1 decision delivered on 15th September 2021, the Ninth Circuit upheld the California Assembly Bill's prohibition on mandatory employment arbitration agreements as a condition of employment. It held that the said state law is not pre-empted by the Federal Arbitration Act and that forcing employees to arbitrate is an unfair practice.

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INVESTMENT ARBITRATION

1. FAVOURABLE ARBITRATION AWARD LEADS TO HIKE IN SHARE PRICES

Following a dispute of laying of the power transmission network in African Countries of Rwanda and the Democratic Republic of Congo, Kalpatru Power had filed an arbitration petition which awarded Rs.236 crores in its favour. This also led to the increase in the share price of Kalpatru Power.

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2. THE DISPUTE CONTINUES EVEN AFTER WORLD BANK TRIBUNAL HOLD ECO ORO MINERALS LIABLE TO PAY COMPENSATION

The Colombian government had approached the International Centre for Settlement of Investment Disputes over the dispute raised by Eco Oro shareholders, who alleged discrimination. The Tribunal awarded \$ 736 million to Colombia but Eco Oro says that the Tribunal is yet to decide the case finally and has acknowledged that Colombia had violated the terms of the treaty).

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3. ICSID CONVENTION SEES THE EXIT OF VENEZUELA

ICSID Convention, a multilateral treaty sponsored by World Bank has been denounced by Venezuela, which however will not have any effect on cases pending before ICSID, as per Article 72 of the convention. It may be mentioned that twenty-eight investment claims are pending before ICSID but it should be noted that ICSID Arbitration is not binding till it is accepted by the investor.

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4. COMMERCIAL DISPUTES IN TWO SEPARATE COUNTRIES, MOROCCO-ALGERIA TO HAVE A CASCADING EFFECT ON MANY OTHER ISSUES OF THE REGION

Two most populated states of Western Africa, having a dispute in the commercial area is likely to have an adverse effect on many other problems of the region like terrorism and migration of people to Europe. It is also added that a French Telecom Company has lodged an ICSID claim against Morocco while another Spanish investor has been threatened off with a claim against Algeria.

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MEDIATION

1. GOVERNMENT OF INDIA TO INTRODUCE A NEW LEGISLATION ON MEDIATION IN INDIA

The Centre government will be introducing a new bill on Mediation in the upcoming winter session of the parliament. Additionally, emphasis was laid on making India an attractive arbitration hub, further showing the government's support for non-litigation methods for dispute resolution. Apart from a few legislations, there is no provision for mandatory mediation in India.

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2. HAINAN (CHINA) HELD A 2-DAY INTERNATIONAL FORUM ON COMMERCIAL MEDIATION

A two-day international forum on Commercial Mediation was held in Hainan, China on the 17th of September, 2021. Participants to the forum ranged from countries such as - India, the UK, Spain, Switzerland, Singapore, Indonesia, Malaysia, Thailand et al. The main theme was to establish a more effective method of cooperation in international business. The International Mediation Centre was also established in Hainan in January,

2021; .it The Centre mainly focuses on commercial disputes.

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3. YOUTH CENTRIC MEDIATION SERVICE LAUNCHED BY QUEBEC

Quebec (Canada) has launched a pilot Youth Centric Mediation Project, wherein they encourage parents and families to consider and seek alternative methods to purely legal processes to resolve conflicts. Cases such as those of child custody, wherein children can be significantly impacted, hopes to provide a better child protection intervention. The service will be free, and the mediators will be experts in family matters and youth protection.

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4. NO CONSENT NEEDED BY COURTS TO REFER CASES TO MEDIATION: KARNATAKA HC

Justice Suraj Govindaraj of the Karnataka HC held that the courts did not need to take consent from the parties or their counsels to refer the case to mediation for amicable settlement. It also held that the courts could not reduce the time duration fixed for the mediation process. The courts

have the power of fining parties absent from meditations sessions, under Rule 13 of the Mediation Rules, 2005.

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CASE ANALYSIS

GEMINI BAY PVT. LTD. V. INTEGRATED SALES SERVICE LIMITED

-Prathu Dadhich and Avishikta Chattopadhyay

FACTS

A representation agreement was signed between Integrated Sales Services Ltd. (“ISS”) and DMC Management Consultants, Ltd (“DMC”) on 18th September 2000. By this agreement, ISS was to assist DMC to sell its goods and services to prospective customers, and in consideration thereof was to receive a commission.

On 22nd June 2009, disputes arose between the parties, prompting Integrated Sales to send a notice of arbitration to DMC. The statement of claim also named Chairman of DMC, Arun Dev Upadhyaya and one Gemini Bay Transcription Private Limited (“GBT”) as party respondents. Arun Dev Upadhyaya was accused of using GBT to move cash away from Integrated Sales. DMC was also accused of terminating contracts with clients brought in by Integrated Sales and then causing the same clients to sign new contracts with GBT. This was done to avoid paying Integrated Sales commission.

DMC, Mr. Upadhyaya, GBT, and GBC were referred to as the respondents. GBC is a company formed in the British Virgin Island whereas GBT is a company formed in India. The first arbitration proceeding on 23rd December 2009 held that the arbitrator has jurisdiction to decide whether a non-signatory to the representation agreement can be bound by the award. Subsequently, on 28th March 2010 three questions were put forth firstly, does the “alter ego” doctrine warrant piercing the corporate veil? Secondly, was there a breach of the representation agreement, and by whom? and thirdly, should damage be awarded, and if the answer is yes, how much? The award was in favour of ISS.

ISS subsequently sought to enforce the foreign arbitral decision by a Single Judge of the Bombay High Court. Because Arun Dev Upadhyaya and GBT were not parties to the arbitration agreement, the Single Judge concluded that the arbitral decision was only enforceable against DMC. On appeal, the

Division Bench of the High Court overturned the Single Judge's decision. Gemini Bay and Arun Dev Upadhyaya took their grievances to the Supreme Court.

ARGUMENTS ADVANCED

Gemini Bay Transcription had based their arguments on two prongs while seeking the dismissal of the award. GBT at the onset contended that the burden of proof is on the person enforcing the award and it can only be discharged by adducing the evidence establishing that a non-signatory can be covered under the foreign award. They further went on to argue that a non-signatory would directly be covered by Section 48(1)(a) and Section 48(1)(c), and a reading of the award would make it clear that the reasons given are sketch and are based on ipse dixit and not facts. They further went ahead to argue that the Award passed by the tribunal was perverse since vital evidence were not led in support of the claimant's case before the arbitrator.

VERDICT

The Supreme Court while weighing on these arguments, observed the following three points:

- Enforceability of Foreign Awards Against a Non-Signatory

A single-judge bench comprising of Justice RF Nariman while dismissing this contention noted that requirements of Section 47(1)(c) are merely procedural as the courts enforcing this award must be satisfied that the award is indeed a foreign award and is enforceable against persons who are bound by it. The court also noted that since this section is procedural in nature, it does not go to the extent of requiring substantive evidence to prove that a non-signatory to an arbitration agreement can be bound by a foreign award. Section 47(1)(c) speaks only of the evidence necessary to prove that the award is foreign.

- Refusal to Enforce Award under Section 48

The court further referred to section 48 and said that the party resisting the foreign award must prove that case falls within subsection (1) or (2) of this Section. It was also noted that unless the party resisting award is not able to show that award comes directly under subsection (1) or (2) it will be enforced as the Arbitration Act has a pro-enforcement bias. Furthermore, Justice Nariman also placed reliance on *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131; and *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1 to state that Section 48(1)(a) to (e) are construed narrowly.

Court noted, Section 48(1)(a) speaks only of parties to the agreement being under some incapacity, or the agreement being invalid under the law to which parties have subjected it and attempting to bring non-parties within these grounds is to try and fit a square peg in a round hole. It was observed that a non-party to the agreement, alleging that it cannot be bound by an award made under such agreement is outside the literal construction of Section 48(1)(a).

➤ Perversity as a ground to challenge the award

Rejecting the argument, the Court noted, “Perversity as a ground to set aside an award in an international commercial arbitration held in India no longer obtains after the 2015 amendment to the Arbitration Act, 1996.” Placing reliance on the law laid down in the *Ssangyong* case, the Court explained that Section 48 has been amended in the same manner as Section 34 of the Arbitration Act. The ground of “patent illegality appearing on the face of the award” is an independent ground of challenge which applies only to awards made under Part I which do not involve international commercial arbitrations.

➤ Tortuous claims arising out of agreement shall be arbitrable

Justice Nariman observed that Section 44 recognises the fact that tort claims may be decided by an arbitrator provided they are disputes that arise in connection with the agreement. Placing the reliance on *Renusagar Power Co. Ltd. v. General Electric Co.*, the court observed that the relevant question is whether the claim arises out of the terms of the contract or is consequential upon any breach thereof. Reliance was also placed on *Tarapore & Co. v. Cochin Shipyard Ltd.* and *Astro Vencedor Compania Naviera S.A. of Panama v. Mabanafi GmbH* to finally conclude that this contention has no legs to stand on

CONCLUSION

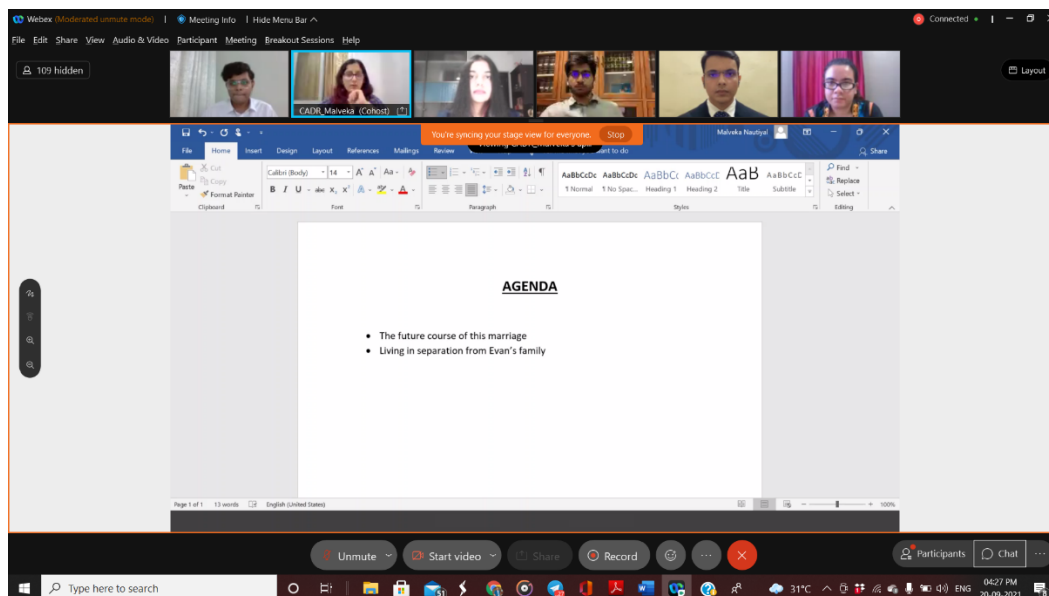
The appeal was dismissed as the appellants were not able to establish any ground to refuse the enforcement of the award. This judgement can be considered one of the parting gifts of Justice RF Nariman as it has finally settled the position on enforcement of the foreign arbitral awards. This judgement has placed reliance on various other pronouncements to emphasise the restrictive scope of the grounds on which the foreign award can be refused in India. Furthermore, it has reinforced India’s pro-enforcement bias and has settled that to get a refusal for enforcement of foreign awards the parties have to demonstrate beyond a doubt that it falls under Section 48.

HIGHLIGHTS OF THE MONTH

EVENTS

➤ ADR MOCK ROUNDS FOR FRESHERS

The Centre for Alternate Dispute Resolution, Rajiv Gandhi National University of Law (CADR-RGNUL) conducted a Mock Mediation as well as a Mock Client Counselling Round for the Batch of 2026, in order to imbibe in the students, the spirit of ADR Competitions, and acquaint them with the technical and procedural understanding of Mediation and Client Counselling sessions. The mediation round was centred around a matrimonial dispute and the session witnessed a smooth flow of plausible arguments which eventually led both parties to a middle ground.



The Client Counselling session aptly encapsulated the nuances and techniques required by counsels to successfully provide their clients with practical solutions for their problems. CADR members played their respective roles and the session was dealt with utmost formality and precision which made it quite enriching.

➤ **ASSIGNMENT BASED WORKSHOP ON IMPORTANCE OF SEAT OF ARBITRATION**

CADR-RGNUL also successfully conducted an “Assignment-Based Workshop on The Importance of Seat of Arbitration.” The workshop was collaboratively hosted by CADR-RGNUL and the Beihai Asia International Arbitration Centre (BAIAC), Singapore with an aim to delve into the concept of seat of arbitration and understand both, its theoretical and practical framework. Prof. Steve Ngo, President, Beihai Asia International Arbitration Centre and Ms Yvette Anthony, Associate Director, LVM Law Chambers LLC Singapore were the speakers for the event and jointly covered the entire workshop. Both the speakers simultaneously explained the role of a seat while framing an arbitration agreement and remarked that “an arbitration-friendly jurisdiction has a proven track record in enforcing arbitration agreements and arbitral awards, and neutral and impartial courts, and availability of impartial courts.” In a nutshell, it was an insightful and enriching learning experience for everyone.

ACHIEVEMENTS

The students of the Rajiv Gandhi National University of Law, Punjab have time and again proven their mettle at various competitions, national as well as international, by bagging multiple accolades at different levels. It is only natural that these awards are recorded and celebrated in the best manner possible in today’s virtual world.

CADR-RGNUL feels immense pleasure to congratulate Jotsaroop Singh for being awarded the **Runners Up Mediator** at the 1st National Mediation Competition organised from September 15 to September 17 by the Mediation Committee Amity University, Madhya Pradesh.

The entire CADR team also feels elated in congratulating Mehvish Alam for qualifying as a **Semi-Finalist Mediator** at the 1st HPNLU National Mediation Competition organized from September 25 to September 26. Mehvish was also declared the Best Mediator of the Preliminary rounds and we congratulate her for the same.

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